IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent. v. JACOB RANDALL SCHRADER, Appellant.	No. 32795-3-II UNPUBLISHED OPINION

PENOYAR, J. — Jacob Randall Schrader (Schrader) appeals his convictions for second degree child rape and communicating with a minor for immoral purposes. We affirm.

FACTS

L.W.K. was born on April 16, 1990 and was best friends with L.L. Schrader is L.L.'s stepfather. On April 5, 2004, L.W.K. spent the night at L.L.'s house. As L.W.K. left the house, Schrader mouthed the words, "call me" to L.W.K. and made a gesture of a telephone up to his ear. Report of Proceedings (RP) at 131. L.W.K. smiled at him and said "okay." RP at 132

Then, on April 7, L.W.K. called Schrader and asked him to drive her home from an appointment. Schrader agreed and picked L.W.K. up and asked her where she wanted to go. She said that she didn't care and asked if Schrader wanted her to help him clean his house.

L.W.K. and Schrader then went to his house. After a sequence of events, Schrader performed vaginal intercourse and oral sex on L.W.K. She indicated that she experienced pain while Schrader had sexual intercourse with her and for a "day or two" afterwards. RP at 221.

On April 8, L.W.K. gave a note to her friend H.L. L.W.K. drew a stick figure of herself looking pregnant with Schrader and L.W.K. indicated that she thought she might be pregnant. At the bottom of the picture in code language, L.W.K. wrote, "Jacob Schrader plus [L.W.K.] equals love." RP at 226-27.

L.W.K. and Schrader began calling each other and sending messages to each other on their cell phones. They talked and sent over twenty messages to each other every day. On one occasion, Schrader sent L.W.K. a message that read, "Snakes are slithering." RP at 229. L.W.K. received the message while she was watching a movie with L.L. and L.L. saw the message.

After midnight on April 16 or 17, Schrader picked up L.W.K. and her friend, J.K., in his car and he drove them around. On another occasion, Schrader picked L.W.K. up in his car and kissed her as she left the car. L.W.K. told Schrader that she would "do anything" with him. RP at 237. L.W.K. never told her parents that she had intercourse with Schrader.

On April 21, H.L.'s, mother found the note that L.W.K. had given to H.L. She recognized the writing as L.W.K.'s, called L.W.K.'s mother and told her about the note.

L.W.K.'s father and mother questioned L.W.K. about Schrader and the note that she wrote to H.L. L.W.K. began crying and told them that she had had sexual intercourse with Schrader. After speaking with her parents, L.W.K. went to her room and received a message from Schrader saying, "Call, ASAP." RP at 251. She wrote him back saying, "I can't, 'cause my

parents found out. And you're in trouble," and she told him to "run" and "get away." RP at 252.

L.W.K.'s father contacted the police and reported his daughter's allegation. Detective Smith went to Schrader's home to question Schrader about the allegations. Upon arrival, he saw a green Honda parked in front of the house, which matched the description of Schrader's vehicle. For twenty to thirty minutes, detectives knocked on Schrader's door, rang the doorbell, and called out in an attempt to get someone to answer the door. The detectives called Schrader's home phone, his cell phone, his stepdaughter L.L.'s phone, and his wife's workplace, but no one answered.

Finally, L.L. arrived home and the detectives told her that they wanted to talk to Schrader. L.L. went inside the house and then came out and said that she did not know if anyone was in the house. The detectives then told Schrader's wife that they needed to talk with Schrader. She went into the house and returned with Schrader.

The detectives then advised Schrader of his *Miranda*[1] rights. After acknowledging that he understood his Miranda rights, Schrader admitted that he knew L.W.K. through his stepdaughter, L.L. and that he had picked up L.W.K. at school a couple of times. Schrader never admitted to spending time alone with L.W.K. or to having sexual intercourse with her.

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

JUROR ISSUES

Schrader was charged with second degree child rape, contrary to RCW 9A.44.076(2), and communicating with a minor for immoral purposes, contrary to RCW 9.68A.090(1).

Before his trial, the court decided that it would choose alternate jurors after the evidence was presented to the jury, not at the beginning of the proceedings. The State agreed. Schrader's counsel voiced concerns with the court's process for choosing alternate jurors, but did not formally object.

During the trial, a juror sent a note to the judge asking that she be selected as an alternate. The juror stated, "I don't feel like I can have a part in sending this defendant (Jacob Schrader) to prison if found guilty by jurors." Clerk's Papers (CP) at 87. At the time that the juror made this statement, the jury had not yet been given their instructions. The parties were both concerned that the juror could not follow the law and was unfit to serve on the jury. The trial court did not make a ruling that the juror was fit or unfit; instead, it read the jury instructions to the entire jury panel, the parties gave closing arguments, and then the court randomly selected the alternate jurors. The juror that had asked to be an alternate was selected as an alternate and did not sit on the jury. After deliberating, the jury convicted Schrader of second degree child rape and communicating with a minor for immoral purposes.

ANALYSIS

1. Trial Court's Selection of Alternate Juror

Schrader argues that the trial court's process for selecting alternate jurors violated CrR 6.5, local rule KCLCR 47(a), and his constitutional right to a randomly selected jury. He argues

that this court should presume prejudice because the trial court made a material departure from normal procedure in selecting alternate jurors.

The State counters that the trial court's process for selecting an alternate juror did not violate Schrader's right to a fair trial. Also, the State explains that Schrader did not raise this argument at the trial court and that his argument on appeal is therefore waived. Finally, the State argues that, even if the trial court erred in its process for selecting alternate jurors, it was not prejudicial.

Under the Washington Constitution, criminal defendants have the right to a speedy public trial by an impartial jury. Wash. Const. art. I, § 22. A defendant also has a right to a randomly selected jury. *State ex rel. Murphy v. Superior Court*, 82 Wash. 284, 286, 144 P. 32 (1914).

Also, under the local rule governing jury selection procedures:

> [A]lternate jurors will be determined by selecting a seat number or numbers in advance out of the presence of the prospective jurors. Whoever is seated in these seats will be the alternate jurors. The alternates will not be told that they occupy alternate status. The jury will be told that if more than twelve (12) remain in the box after final argument that the alternates will be announced and excused at that time.

KCLCR 47(a)(2).

In this case, the jury and alternate jurors were randomly selected and Schrader fails to articulate any constitutional right that the court's selection process violated. Even if the court had followed the local rule, the only practical jury selection difference would have been that counsel would have known who the alternate jurors were at the beginning of the trial. Schrader did not adequately explain how this knowledge would have assisted his defense in any way.[2] Parties

[2] Schrader's counsel explained to the court, "I direct things to individuals, and it's just my technique. I'd prefer to know who they [the alternates] are . . . But that would be helpful for me

raising constitutional issues must present considered arguments to this court. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). It is not clear how knowledge of the alternate jurors would have changed Schrader's defense and we decline to consider Schrader's constitutional argument.

We will presume that an error in jury selection was prejudicial only if it was a material departure from jury selection procedure. *State v. Twyman*, 143 Wn.2d 115, 122, 17 P.3d 1184 (2001). Schrader also argues this court to presume prejudicial error from the trial court's procedure. There is no evidence that the court's procedure was a material departure from normal procedure and we decline to presume prejudice. The trial court's decision to choose alternate jurors before closing arguments was not a material departure. We hold that there was no prejudicial error in the trial court's jury selection procedure.

2. Comment on Defendant's Right to Silence

Schrader next argues that the trial court erred in admitting portions of Detective Smith's testimony. The court permitted Smith to testify that Schrader was "nonresponsive" and that he "contradicted himself." RP at 445. Schrader contends that this testimony was opinion testimony and improper. Schrader argues that the testimony was a comment on his right to silence and violated his right to due process. Schrader disputes the following testimony.

> A [Smith] Well, *he was nonresponsive to some of my questions*. He'd give an answer like the one I just mentioned that he talked about it was flirting. Then he would tell me, "No, we weren't alone." So he would contradict himself on some of the statements that he was making.

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to know." RP at 96. Although it may have been "helpful" this is not sufficient justification.

. . .

Q	Okay. And Mr. Schrader denied it. He said he didn't have sex with her?
A [Smith]	Well, I don't know that I would say he denied it.
Q	He said that he was never alone with her. He said that he did not have sex with her, correct?
A	*He contradicted himself several times, yes.*
Q	Did he ever admit to you that he had sex with her?
A	No.

RP at 445, 460. (Emphasis added).

The State counters that this testimony was proper because Schrader willingly spoke with detectives and did not invoke his right to remain silent after detectives advised him of his *Miranda* rights. Further, the State argues that Schrader does not cite to relevant portions of the record, did not object to this testimony at trial court, and therefore urges this court to reject Schrader's claims.

Admission of evidence is within the sound discretion of the trial court and will not be disturbed on review absent a showing of abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306 (1987). Abuse occurs when the trial court's discretion is manifestly unreasonable. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538 (1983).

We find no abuse of discretion in the admission of Detective Smith's testimony. When a defendant does not remain silent and instead talks to police, it is not error for the State to comment that the defendant failed to deny committing the crime. *State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978). Similarly, it was not error here. In his testimony, Smith did not give

his opinion about Schrader's guilt, he merely commented on whether Schrader answered his questions. We hold that the trial court did not err in admitting Detective Smith's testimony.

3. Schrader's Wife's Testimony

Schrader next argues that his wife's testimony that she heard Schrader say to Detective Smith, "I didn't do anything. I didn't do it" should have been admitted because it was not hearsay. RP at 512. The testimony was not being offered for the truth of the matter asserted but for impeachment purposes. He asserts that he offered the testimony to impeach Detective Smith's testimony that Schrader was "nonresponsive" and "elusive." Br. of Appellant at 21. Schrader also argues that the testimony should have been admitted under the rule of completeness and as a prior consistent statement offered to rebut a recent fabrication.

A party may only assign error in this court on the specific grounds of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). At trial, Schrader did not object to the exclusion of his wife's testimony on the grounds that it violated the rule of completeness or the rule regarding prior inconsistent statement. Schrader only argued that the evidence was admissible hearsay. Schrader may not now assert additional grounds for admission of this evidence on appeal and we address only Schrader's hearsay argument.

Again, admissibility of evidence is within the trial court's sound discretion. *State v. Stubsjoen*, 48 Wn. App. at 147. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100

Wn.2d 188, 196, 668 P.2d 571 (1983). Although the trial court likely abused its discretion in excluding the wife's testimony, the error was not prejudicial and not grounds for dismissal. Schrader offered this testimony as non-hearsay. The wife's testimony was offered to prove what Schrader said to Smith, and not for the purpose of proving what Schrader said to Smith was true. Thus, this was proper impeachment testimony and not offered for the truth of the matter asserted. However, in direct testimony, Schrader denied that he committed the offenses he was charged with and Schrader offered his own version of his conversation with Officer Smith to the jury. Therefore, the error was not prejudicial. The excluded evidence was merely cumulative evidence from Schrader's wife, an obviously interested third party, as to the strength of Schrader's denial to Officer Smith. We therefore hold that any error was harmless and not grounds for reversal.

4. Evidence that Schrader Evaded Arrest

Next, Schrader argues that the trial court erred in admitting evidence of his refusal to respond to detectives for almost a half hour when detectives were at his home. He argues that he had the right to withhold consent to enter his home and that his actions were not relevant because they did not constitute a consciousness of guilt. The State counters that the evidence of Schrader's delay to open his front door was relevant to Schrader's consciousness of guilt and that the trial court properly admitted it.

Again, we find no error. Evidence is relevant if it has a tendency to make the existence of any fact of consequence to the determination of the issue more probable or less probable than it would be without the evidence. ER 401.

In Washington, courts have found several forms of conduct relevant and admissible

because they allow a reasonable inference of consciousness of guilt on the part of the defendant. *See State v. Chase*, 59 Wn. App. 501, 799 P.2d 272 (1990) (defendant's giving a false name when first contacted by the police was admissible as a consciousness of guilt); *State v. McGhee*, 57 Wn. App. 457, 788 P.2d 603 (1990) (defendant's threats were admissible as a consciousness of guilt); *State v. Hebert*, 33 Wn. App. 512, 656 P.2d 1106 (1982) (defendant's flight from the crime scene was admissible as a consciousness of guilt). Evidence of resisting arrest, concealment, and assumption of a false name are admissible if they allow a reasonable inference of consciousness of guilt *State v. Freeburg*, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001).

There was no abuse of discretion in the trial court's admission of the evidence that Schrader waited almost a half hour to answer the door. L.W.K. testified that she wrote Schrader a text message saying she could not call him on April 7, because her "parents found out." RP at 252. She wrote him that he was "in trouble," and told him to "run" and "get away." RP at 252. L.W.K. wrote this text message to Schrader before the detectives arrived at his home for questioning. Therefore, it was reasonable to infer that the reason Schrader did not open the door for police was because he knew police were there to question him about his interactions with L.W.K. We hold that there was no error in the trial court's determination that this evidence was relevant to Schrader's consciousness of guilt.

5. Cumulative Error

Finally, Schrader argues that cumulative error denied him a fair trial. If several errors occurred at the trial court level, none of which alone warrants reversal, but cumulatively the errors denied the defendant a fair trial, then reversal is proper. *State v. Hodges*, 118 Wn. App.

668, 673, 77 P.3d 375 (2003). The defendant bears the burden of proving cumulative error. *See In re the Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). An error must be prejudicial in order for cumulative error to deprive a defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

Since we hold that the trial court did not err, cumulative error is not relevant to this case.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

PENOYAR, J.

We concur:

HOUGHTON, P.J.

ARMSTRONG, J.